

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
vs.
JUAN HERON-SALINAS,

Plaintiff,

Defendant.

CASE NO. 07cr2872 JM

ORDER DENYING MOTION TO
DISMISS INDICTMENT

Defendant moves to dismiss the indictment on the ground that his prior conviction for assault with a firearm, in violation of Cal. Penal Code §245(a), is not a crime of violence as that term is defined in 8 U.S.C. §16. The Government opposes the motion. For the reasons set forth below, the motion to dismiss the indictment is denied.

BACKGROUND

On October 9, 2007 Defendant attempted to enter the United States at the San Ysidro Port of Entry. Defendant, along with three other individuals, were concealed in the trunk of an automobile that sought entry into the United States. Upon discovery, Defendant was taken to secondary where it was determined that Defendant had a criminal and immigration history.

Defendant's criminal history arises from a January 18, 2000 conviction by plea in Los Angeles Superior Court for Assault with a Firearm in violation of Penal Code §245(a)(2). Defendant received a 72 month custodial sentence and was also ordered to

1 pay restitution to the victim for medical, hospital, and lost wages expenses.

2 On December 30, 2004 an immigration judge determined that the assault with a
 3 firearm conviction rendered Defendant removable as the conviction was a crime of
 4 violence which constituted an aggravated felony. Defendant was removed yet returned
 5 to the United States. On December 4, 2006 Defendant was convicted in this district of
 6 alien smuggling in violation of 8 U.S.C. §1324. Defendant now challenges the
 7 immigration judge's determination that violation of Penal Code §245(a)(2) is an
 8 aggravated felony.

9 DISCUSSION

10 A defendant in a §1326 prosecution may collaterally attack the prior deportation
 11 before trial and preclude the government from relying on such deportation only "if the
 12 deportation proceeding was so procedurally flawed that it effectively eliminated the
 13 right of an alien to obtain judicial review. . . ." United States v. Alvarado-Delgado, 98
 14 F.3d 492, 493 (9th Cir. 1996), cert. denied, 117 S.Ct. 1096 (1997). The collateral attack
 15 of a prior deportation is statutorily permitted only if:

16 (1) the alien has exhausted any administrative remedies that may have
 17 been available to seek relief against the order,
 18 (2) the deportation proceedings at which the order was issued improperly
 deprived the alien of the opportunity to seek relief against the order; and
 (3) the entry of the order was fundamentally unfair.

19 8 U.S.C. §1326(d)(1-3). To prevail in attacking the validity of a prior deportation the
 20 defense must show that (1) due process rights were in fact violated and (2) prejudice.
 21 United States v. Gutierrez-Alba, 128 F.3d 1324 (9th Cir. 1997).

22 Defendant argues that assault with a deadly weapon is not an aggravated felony.
 23 Defendant contends that a conviction for assault with a deadly weapon under Penal
 24 Code §245(a) may be sustained upon proof that a person acted either recklessly or
 25 negligently and therefore the crime is not categorically a crime of violence. This
 26 argument is not persuasive.

27 The process for determining whether a prior conviction qualifies as an aggravated
 28 felony is summarized in United States v. Pallares-Galan, 359 F.3d 1099, 1099 (9th Cir.

1 2004):

2 Under Taylor's (Taylor v. United States, 495 U.S. 575 (1990)) categorical
 3 approach, the issue is not whether the actual conduct constituted an
 4 aggravated felony, but whether the full range of conduct encompassed by
 5 the state statute constitutes an aggravated felony, and we look only to the
 6 fact of conviction and the statutory definition of the prior offense to make
 7 this determination. If we determine that the statute which the defendant
 8 was found to have violated is broader in scope than the federal provision
 9 – that the statute proscribes not only conduct that would constitute an
 10 aggravated felony but also conduct that would not – then the state
 11 conviction may not be used, except under a 'modified categorical
 12 approach.' Under the modified categorical approach, the conviction may
 13 be used only if the record contains documentation of judicial noticeable
 14 facts that clearly establish that the conviction is a predicate conviction.
 15 Moreover, when applying the modified categorical approach we are
 16 limited to consulting a narrow and carefully specified set of documents in
 17 order to determine whether the particular conviction qualifies (charging
 18 documents, jury instructions, verdict form, abstract of judgment, etc.).
 19 (citations omitted).

20 Here, the court concludes that a conviction for violation of Penal Code 245(a) is
 21 categorically a crime of violence. A crime of violence means:

22 (a) an offense that has an element the use, attempted use, or threatened use of
 23 physical force against the person or property of another, or
 24 (b) any other offense that is a felony and that, by its nature, involves a substantial
 25 risk that physical force against the person or property of another may be used in the
 26 course of committing the offense.

27 8 U.S.C. §16.

28 California's assault statute defines assault as "an unlawful attempt, coupled with
 29 the present ability, to commit a violent injury on the person of another." Cal. Penal
 30 Code § 240. Among other elements, the following elements must also be proved:

31 1. A person willfully [and unlawfully] committed an act which
 32 by its nature would probably and directly result in the
 33 application of physical force on another person.

34 2. The person committing the act was aware of facts that would
 35 lead a reasonable person to realize that as a direct, natural
 36 and probably result of this act that physical force would be
 37 applied to another person; and

38 3. At the time the act was committed, the person committing the
 39 act had the present ability to apply physical force to the
 40 person of another. The word "willfully" means that the
 41 person committing the act did so intentionally. However, an
 42 assault does not require an intent to cause injury to another
 43 person, or an actual awareness of the risk that injury might
 44 occur to another person. To constitute an assault, it is not

1 necessary that any actual injury be inflicted. However, if an
 2 injury is inflicted it may be considered in connection with
 3 other evidence in determining whether an assault was
 4 committed [and, if so, the nature of the assault].

5 Cal. Jury Instr. Crim. 9.00. As an assault with a firearm under Penal Code 245(a)(2)
 6 requires intentional conduct, Defendant's authorities, cited for the proposition that
 7 negligent or even reckless conduct is insufficient to support a finding of a crime of
 8 violence, are inapposite. See Leocal v. Ashcroft, 543 U.S. 1, 13 (2004) (A DUI cannot
 9 be a crime of violence where the statute defining the offense "reaches individuals who
 10 were negligent or less."); Fernandez-Ruiz v. United States, 466 F.3d 1121 (9th Cir.
 11 2006) (en banc) (Arizona statute imposing criminal liability based upon recklessly
 12 causing physical injury is not a crime of violence).¹ In the present case, the crime of
 13 assault with a firearm is categorically a crime of violence under either §§16(a) or (b) as
 14 the offense requires an intent to commit assault and has as "an element the use,
 15 attempted use, or threatened use of physical force against the person," 8 U.S.C. §16(a),
 16 or is an offense which "involves a substantial risk that physical force against the
 17 person" be used. 8 U.S.C. §16(b).

18 In sum, the motion to dismiss the indictment is denied.

19 **IT IS SO ORDERED.**

20 DATED: March 25, 2008

21 
 22 Hon. Jeffrey T. Miller
 23 United States District Judge

24 cc: All parties

25 ¹ The court further notes, by analogy to the following cases, that assault with a firearm is
 26 categorically a crime of violence. In United States v. Bolanos-Hernandez, 492 F.3d 1140 (9th Cir.
 27 2007), the Ninth Circuit held that assault with intent to commit rape under Penal Code 220 constituted
 28 a crime of violence. Further, the Ninth Circuit has indicated that a "voluntary manslaughter
 conviction qualifies as an aggravated felony" under the categorical approach even though a convicted
 individual acts without malice when he acts upon a sudden quarrel or heat of passion. Anderson v.
 Gonzalez, 497 F.3d 927, 937 (9th Cir. 2007).